UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In re NATIONAL HOCKEY LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION This Document Relates To: ALL ACTIONS.	No. 0:14-md-02551 (SRN/JSM) MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND FOR APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL **[REDACTED]**

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I. INTRODUCTION

The National Hockey League ("NHL" or the "League") both actively and passively undermined the ability of NHL players to understand the true risks associated with playing hockey in the NHL and with receiving countless concussive and sub-concussive blows to the head. These efforts included outright denial of the danger, such as in NHL Commissioner Gary Bettman's ("Bettman") letter to U.S. Senator Richard Blumenthal touting the lack of conclusive "scientific proof" that repeated head impacts can cause chronic traumatic encephalopathy ("CTE") and other neuropathologies, despite an overwhelming body of science to the contrary.[1]

Plaintiffs' experts, all leaders in their respective fields, cogently explain why the NHL was negligent, and why the players merit medical monitoring and other legal relief. The NHL promoted extreme violence and head hits for decades, creating an environment where the average player sustained enough neuronal strain and damage through head impacts ***in a single NHL game*** to place them at a permanently increased risk of developing a Neurological Disease, Disorder, or Condition ("NDDC").[2] Yet, while a ***hundred years*** of medical and scientific research had pointed to the dangers of NDDCs caused by repeated head impacts, the NHL intentionally turned a blind eye to it, failing to let players know of the true risks of the violence from which the NHL fed and

[1] ECF No. ("Dkt.") 561.

[2] "NDDC" includes ALS, Alzheimer's, Parkinson's, CTE, Frontotemporal Dementia, Lewy Body Dementia, Parkinson's Dementia, and other neurodegenerative disease or conditions, as well as any cognitive, mood, or behavioral conditions where such conditions arose after retirement from the NHL.

purposefully refusing to conduct any study of its players. The NHL's public denials were nonsense.

Worse still, the NHL has spent at least 50 years perpetuating the myth that repeated punches to the head somehow make players ***safer***, because ***only NHL hockey*** has the intensity and passion that requires the "safety valve" of bareknuckle fist-fighting; other sports like NFL football, lacrosse, rugby, and international hockey are "panty-waist" sports[3] [redacted] because they lack the signature fist-fights and head hits of the NHL. However, this case is not about the NHL's propagation of unnecessary violence; it is about the NHL's failure to warn its players of the true, long-term risks associated with the NHL's deliberate, money-driven creation of that violence.

The denials, combined with claims of ever-receding scientific "conclusiveness," echo hollowly in the chamber of history's great subterfuges, always elicited to shield the purveyor of harm, always rationalizing the failure to act. When science identifies the dangerous condition, the purveyor retorts, "it needs more study," but conveniently avoids – or attacks – such study. For years, tobacco executives publicly denied the causal link between smoking and cancer, clinging to obfuscation for as long as they could. The NHL's denials and decision to "leave dementia issues to the NFL," *i.e.*, to avoid study of

[3] Ex. 1. All references to "Ex. __" are to exhibits to the Declaration of Charles S. Zimmerman In Support of Plaintiffs' Motion for Class Certification and for Appointment of Class Representatives and Class Counsel, filed contemporaneously.

[4] Ex. 2.

the very retiree issues at issue in this case,[5] similarly stand as deliberate concealment of the risks of playing NHL hockey.

Companion to its denials stands the NHL's paradoxical position that, on the one hand, risks of developing NDDCs associated with repetitive head trauma are "nascent," and not "conclusive,"[6] but, on the other hand, that its players were somehow adequately warned of these risks, accepted the risks, and the League has fulfilled its duty to minimize these risks – the very risks which Bettman and the NHL deny exist. Even if the NHL had warned its players of the risks of developing NDDCs, such warnings would have been undermined by Bettman's every action, which continue to this day. The diluted warnings the NHL claims to have given were not only inadequate but were also wholly undermined by the League, which employs "protective" measures lackadaisically and contrary to modern medical science. One need only observe the waves of players returning to the ice in the same game they were concussed, despite the well-known and critical importance of post-concussion rest.[7]

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[5] *Infra* §II.E.4.

[6] Dkt. 561 at 2.

[7] Ex. 3 (showing that during the 2009-2013 seasons, an average of ***over 40%*** of concussed players returned to play in the same game). While the NHL was content to allow enforcers to fight multiple times a game, or allow visibly concussed players to keep dishing out hits, even combat sports like ***boxing***, surely not a "panty-waist" sport, take greater efforts to protect its athletes, mandating extended medical suspensions following a stoppage, with multi-month suspensions following a knockout. *See, e.g.*, *Medical Standards for Professional Boxers*, NYSAC, Dec. 9, 2014, http://www.dos.ny.gov/athletic/pdfs/medicalmanual.pdf.

Instead of observing its duty to warn its players about the long term effects of NHL-style hockey, the League has long embarked on the path history has repeatedly judged and discarded—incanting denial and peddling fictional standards of "proof" rejected by both science and the law. As a result, the players are now, quite literally, abandoned, as they and their families are forced to bear the financial, psychological, and physiological burdens of having badly damaged brains alone, while the NHL continues to reap enormous profits.

On behalf of all retired NHL players left by the NHL to fend for themselves, Plaintiffs now seek medical monitoring for retired players who have an increased risk of future NDDCs due to the brain damage they incurred during their NHL careers, and some Plaintiffs seek money damages to assist those players who have already been diagnosed with an NDDC. Medical monitoring would give many benefits to retired players, including providing time-sensitive diagnoses to retired players and providing epidemiological data to assist both present and future NHL players. Furthermore, medical monitoring would diagnose and provide guidance for those players who have CTE or other NDDCs, and alleviate the fears of those who do not.

In order to resolve the claims and common issues in this case in the most efficient and judicious manner possible, Plaintiffs now respectfully ask this court to certify a Rule 23(b)(2) class for all retired players that qualify for medical monitoring,[8] and a Rule 23(c)(4) class for all class members who have already been diagnosed with an NDDC to

[8] In the alternative, Plaintiffs seek a Rule 23(c)(4) issue certification class for all issues common to the medical monitoring class.

address common issues of the NHL's duty, its breach of that duty, identifying signature injuries, and general causation. As Plaintiffs' experts and the record evidence shows, this case warrants certification as a class action so that Plaintiffs and the class may finally receive the care and compensation they deserve.

II. STATEMENT OF FACTS

A. The NHL's Self-Described Duty – and Power – to Protect its Players.

NHL hockey's highly centralized operation requires each of its member clubs to follow the strict leadership of the NHL's chief executives and the NHL Board of Governors ("Board"). Through the Board, the NHL regulates operation of the League, including the appointment of the Commissioner, rule changes, player equipment, and health and safety decisions.[9] [redacted]

The NHL has always possessed and exercised unilateral power over [redacted] medical standards,[13] and player education – the

[9] *Constitution of the NHL*, SPORTS DOCUMENTS, Nov. 13, 2013, http://sportsdocuments.com/2013/11/nhl-constitution.

[10] Ex. 4 at NHL0503448; *see also* Deposition Transcript of Bill Daly, Aug. 9, 2016 ("Daly Dep.") 78:8-11, Ex. 5; Ex. 6.

[11] Ex. 7; Ex. 8; Ex. 9; Ex. 10.

[12] Ex. 11; Ex. 7.

[13] Ex. 12; Ex. 13; Ex. 7.

major factors influencing player safety.[14] Using this power, the NHL has repeatedly confirmed its duty of care for the health and safety of its players. As the NHL acknowledged when preparing a draft of its own 1989 mission statement,

> The NHL Mission ... is to promote the health of NHL players and to prevent injury which can be disabling or threatening to the livelihood of the players and their personal well-being .... This Mission statement articulates a commitment by the [NHL] to player health and the prevention of injury as critical to safety in the NHL work place.[15]

Commissioner Bettman echoed this duty a decade later when he called head injuries a "major concern" and avowed: "We're studying [concussions], we're working hard. We've got to make sure we know everything possible to try to protect the players."[16] Fifteen years later, Deputy Commissioner Bill Daly ("Daly") reiterated: "You have to do what is right [about concussions]. Obviously, we feel there is an obligation on the part of the league office to make the game as safe as it can be...."[17] In 2008, senior NHL executive Colin Campbell confirmed: "Taking steps to maintain the safest on-ice environment possible for the Players remains our most important priority."[18] The NHL, by its own admission, has "always" had this duty.[19]

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[14] Declaration of R. Dawn Comstock, Ph.D ("Comstock Declaration"), filed contemporaneously, ¶¶118, 123; Ex. 14.

[15] Ex. 15.

[16] Ex. 16.

[17] Eric Macramalla, *Bill Daly discusses the lockout, the Olympics, and concussions*, CBS SPORTS, May 14, 2013, http://www.cbssports.com/nhl/news/bill-daly-discusses-the-lockout-the-olympics-and-concussions/.

[18] Ex. 17.

[19] Ex. 18.

Confirming its power and duty to implement safety directives, the NHL has taken steps – albeit baby steps – to protect player health and safety, including making helmets mandatory[20] (36 years after the NFL, notwithstanding the NHL's grandfathering rules which permitted helmets not being worn by some players as late as the 1996/97 season) and the implementation of the 1997 "Concussion Program."[21] [redacted] and issuing memoranda to teams advising of the NHL's stricter enforcement of rules to protect players' heads.[23] These continued actions confirm the NHL's assumption of its duty regarding players' brain health.

B. A History of Violence.

Since the NHL's inception, the League's approach to violence has vacillated between active promotion and benign neglect.[24] In the first forty years of its existence, the NHL demanded tough, physical play from its teams. One coach summarized the era: "[i]f you can't beat 'em in the alley, you can't beat 'em on the ice."[25] As its players put this motto into practice, penalties for fighting were inconsequential.[26] The NHL tolerated

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[20] Ex. 19; Ex. 20.

[21] Ex. 21; Ex. 22; Ex. 7.

[22] Ex. 23; Ex. 24 at NHL0120325.

[23] Ex. 25.

[24] *See generally* Declaration of D'Arcy Jenish ("Jenish Declaration"), filed contemporaneously, §VI.

[25] *Id.* ¶¶90-93.

[26] *Id.* ¶96.

fighting to drive the League's economic growth. During a 1942 Board meeting discussing hockey violence, famed NHL coach Lester Patrick noted: "Who has ever been hurt in a fight in a hockey game? You are throwing gold out of the window."[27]

Hockey violence in the 1970s grew 500% from the level in 1942, as enforcers became a popular feature on NHL teams.[28] The NHL vigorously promoted the "Broad Street Bullies,"[29] and emphasized the importance of aggression-filled rivalry games.[30] The 1980s, according to the NHL, were the "Golden Era of Fighting," with fights occurring at 10 times the frequency of the NHL's nascent years.[31]

Despite regular criticism over the decades,[32] including formal government inquiries,[33] the NHL obstinately refused to eliminate fighting. [redacted] Others, such as then-NHL President Clarence Campbell (1946-1977), touted fighting as a "safety valve," theoretically allowing the release of aggression

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[27] *Id.* ¶¶97-99; Ex. 26 at Plaintiffs-NHL00000029.

[28] Jenish Declaration, ¶113; Ex. 27 at NHL0230656.

[29] Jenish Declaration, ¶116.

[30] *Id.* ¶¶130-131; Ex. 27 at NHL0230647.

[31] Jenish Declaration, ¶129; Ex. 27 at NHL0230647.

[32] Jenish Declaration, ¶¶75, 119.

[33] *Id.* ¶¶123-124.

[34] *Id.*, §III, ¶¶135, 144; Ex. 28 at NHL0121721; Ex. 29; Ex. 30; Ex. 31; Ex. 32.

[35] Ex. 28; Ex. 33; Ex. 16; Ex. 34.

in a supposedly safer manner than swinging sticks or skates.[36] This often-repeated, reflexive NHL excuse for intentional brain damage was reiterated as recently as ***June 2016*** when Bettman said fighting was a "thermostat" necessary to manage the "emotional, edgy game."[37] Notably, the NHL is the only major sporting league that "tolerates" fighting,[38] [redacted]

Violence's profitability has remained a central recurring theme. [redacted] Clarence Campbell put it bluntly: violence is "part of the show" that the NHL "sells" to its fans.[43] As Colin Campbell, NHL Executive VP and Director of Hockey Operations, stated succinctly, [redacted]

[36] Ex. 1; Ex. 35; Ex. 36; Ex. 37 at NHL0127812.

[37] Video, *Commissioner Gary Bettman fights to keep fighting in NHL*, SPORTS ILLUSTRATED, http://www.si.com/nhl/video/2016/06/27/commissioner-gary-bettman-fighting (last visited Dec. 6, 2016).

[38] Ex. 16; Ex. 35.

[39] Ex. 38.

[40] Ex. 39; Ex. 40; Ex. 41.

[41] Ex. 42; Ex. 43; Ex. 44.

[42] Ex. 1; Ex. 45; Ex. 46; Ex. 47; Ex. 48; Ex. 49.

[43] Ex. 36.

[redacted] Stephen Walkom, former referee and current Vice President and ***Director of Officiating***, has added: "we sell violence."[45]

C. "Hits to the Head – A Part of Hockey's History."[46]

The NHL's enduring enthusiasm for fighting was surpassed only by its belief in the sanctity of hitting[47] and the brutal excitement it added to games.[48] [redacted]

According to Colin Campbell, the NHL rarely, if ever, punished hard hits to the head prior to 1995[50] – they were routine, an essential part of the sport.[51] In the following decade, even as numerous players suffered career-ending injuries from head trauma[52] and the NHL's own analysis showed that while 70% of concussions were traceable to direct hits to the head–most with no penalties imposed[53]–[redacted]

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[44] Ex. 50. *See also* Deposition Transcript of Colin Campbell, June 30, 2015, 269:8; 270:11-12; 270:23-24, Ex. 51.

[45] Ex. 52.

[46] Ex. 53.

[47] Ex. 54.

[48] For a compilation of visual examples, *see* http://nhlvideo.rgrdlaw.com/.

[49] Ex. 55.

[50] Ex. 56.

[51] Jenish Declaration, ¶161; Ex. 57.

[52] Ex. 24 at NHL0120337-339.

[53] Ex. 58.

In 2007, following a series of vicious incidents that drew great public ire,[55]

However, splitting that hair was pointless, as Brian Burke ("Burke"), then-Toronto GM and former NHL President of Hockey Operations said it was never "his opinion that head hunting and or 'illegal' reaction plays … are intentional attempts to injure ... ***they are hockey plays***."[57] Mike Murphy, the NHL's VP of Hockey Operations, reiterated: "we don't want to discourage hitting. Hitting is a very important component of our game."[58]

Despite the success of automatic penalties for all head hits in the intensely physical NFL, Burke maintained "there's no appetite for an automatic penalty. Hitting is a ***critical*** part of our game; it's

[54] Ex. 59; Ex. 60; Ex. 61.

[55] Jenish Declaration, ¶¶164-190.

[56] Ex. 62 at NHL0232754.

[57] *Id.* at NHL0232755. Citations, internal quotations, and footnotes omitted, and emphasis added, unless otherwise noted.

[58] Ex. 54.

[59] Ex. 63.

[60] Ex. 64.

distinctive to North American hockey."[61] Colin Campbell agreed, stating that "[the GMs] don't want to take this type of hit out of the game … it would change the ***fabric of the game*** totally."[62]

Unsurprisingly, the NHL's efforts to curb head hits amounted to window dressing.[63] In 2001, the NHL Injury Analysis Panel proposed to ban a certain category of direct head hits, which the GMs rejected.[64] In 2007, Bettman proposed to "ban[] hits where the initial or primary contact was with the head."[65] Despite 23 votes in favor,[66] [redacted] In 2009, the National Hockey League Players' Association ("NHLPA") sought to ban "targeted" head hits,[68] [redacted] before the NHL finally settled on a partial and irregularly enforced ban on blind-side head hits.[70]

Predators chairman Tom Cigarran highlighted the dangerous flaw in this half-measure: "ANY hit to the head MUST be a Major penalty and result in a suspension. We

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61 Ex. 65.

62 Ex. 66.

63 Ex. 67.

64 Ex. 24 at NHL0120350.

65 Ex. 68.

66 *Id.*

67 Ex. 69 at NHL2180442; Ex. 70 at NHL0200275.

68 Ex. 71.

69 Ex. 72.

70 Ex. 73.

would be the last league to take this position so this is not a RADICAL concept. The cost of our delay is huge in financial terms and in terms of damage to player careers as well."[71] Unfortunately, to this day, "[w]e see many hits where there is head contact, even significant head contact, but are not illegal based on how the rule is currently written and interpreted. Who knows, maybe one day all head contact will be illegal, but that is not the case right now."[72] Perhaps the best summary of the NHL's acceptance of unnecessary hits was [redacted]

D. The NHL Knew of the Long-Term Risks Associated with NHL Hockey.

The medical and scientific community has known for over 100 years that repeated blows to the head can lead to NDDCs,[74] even if the nomenclature[75] or theorized cellular and subcellular effects on the brain[76] evolved over the course of the NHL's existence. The record of scientific study in concussions, subconcussive blows, and associated NDDCs long ago established the medical and scientific community's knowledge that repetitive head impacts increase the likelihood of chronic neurodegenerative disease.

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[71] Ex. 74; *see also* Ex. 75; Ex. 76.

[72] Ex. 77.

[73] Ex. 78.

[74] Declaration of Stephen T. Casper, Ph.D. ("Casper Declaration"), filed contemporaneously, §§III, VI.

[75] *Id.*, §V.C.

[76] *Id.*, §§V.F, V.G.

Observed and discussed between the 1870s and 1920s,[77] these neuropathologies were associated with head impacts in contact sport from the 1920s onward.[78] From the 1940s through the 1990s, the association between head impacts and neurodegenerative disease was examined in closer detail.[79] Studies specifically examined the cumulative nature of concussive and subconcussive blows.[80] Neither obscure nor isolated, these findings were published in prominent scientific and medical journals, available to any medical professional.[81] In fact, the NHL's medical professionals were – and are – duty-bound to apprise themselves of the long-term risks associated with concussive and subconcussive blows.[82]

Numerous documents reveal that the NHL knew a good deal about the long-term risks of concussive and subconcussive blows that it did not share with its players.[83] The effects of repeat concussions and rapid return-to-play were purposefully omitted from documents circulated to GMs about head hits, because they "open[] a can of worms,"[84]

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77 *Id.*, §§V.E.1-6, V.H.1.

78 *Id.*, §V.H.2.

79 *Id.*, §V.H.3.

80 *Id.*, ¶¶255-264; §V.E.10.

81 *Id.*, ¶270.

82 *Id.*, ¶¶280-281.

83 Ex. 79; Ex. 80; Ex. 81.

84 Ex. 82.

[redacted] Players who had received repeated concussions were colloquially termed [redacted]

As CTE became prominent in public discourse, it was discussed in greater detail among NHL executives. [redacted]

In simpler terms, Daly summarized the known risks associated with NHL hockey: "Fighting raises the incidence of head injuries/concussions, which raises the incidence of depression onset, which raises the incidence of personal tragedies."[90] [redacted]

[85] Ex. 83.

[86] Ex. 84.

[87] Ex. 85.

[88] Ex. 86.

[89] *Id.*

[90] Ex. 87.

[redacted] Indeed, Bettman's recently renewed claim that repeated head impacts have ***no*** long-term consequences[92] has been contradicted by the NHL's own Chair of the Concussion Subcommittee, Dr. Ruben Echemendia, who, while trying to qualify it, nevertheless, ***acknowledged*** in 2011 that "[t]here is evidence at this point in time to speculate about a link between repetitive blows to the head and C.T.E."[93]

In fact, unhappy with the NFL's admissions that retired players are at increased risk for NDDCs and that CTE, specifically, is linked to repetitive head trauma,[94] and its agreement to take care of NFL retirees,[95] the NHL is at pains to maintain that "hockey is not football" as a basis to refute the risk.[96] While keeping its concussion data to itself,[97] the NHL has concocted a perplexing, internally-inconsistent narrative that NHL hockey is

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91 Ex. 88.

92 Dkt. 561-1.

93 Ex. 89.

94 *NFL admits football link to brain disease CTE*, YAHOO! SPORTS (Mar. 14, 2016), http://sports.yahoo.com/news/nfl-admits-football-brain-disease-cte-024523993--nfl.html.

95 NFL Concussion Settlement Program Website, www.nflconcussionsettlement.com.

96 Deposition Transcript of Gary Bettman, July 31, 2015 ("Bettman Dep.") 180:1; 183:9, Ex. 90.

97 *See* Deposition Transcript of Julie Grand, Aug. 3, 2016 ("Grand Dep.") 239:4-10, 240:2-8, Ex. 91; Ex. 92; Ex. 93.

unique in its physicality and intensity,[98] yet somehow safer and less violent than football.[99]

Dr. Kevin Guskiewicz, one of the NHL's own concussion experts in this case, has said [redacted]

One of the nation's leading epidemiologists on head injury, Dr. Dawn Comstock, concurs that NHL concussion risks are similar to football.[102]

To be sure, in 2007, Echemendia emailed NHL Deputy General Counsel Julie Grand ("Grand") regarding NCAA injury surveillance data for 1998-2004 stating "***ice hockey*** is the sport with the ***highest risk*** of concussion among college athletes for both men and women. The risk is ***higher than football*** for men."[103] Recreation of head impacts gleaned from video review of 120 NHL games over four decades produced

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98 *Supra*, n.37.

99 Josh Cooper, *Bettman says hockey different from football on concussions*, PUCK DADDY (Mar. 16, 2016), http://sports.yahoo.com/blogs/nhl-puck-daddy/bettman-says-hockey-different-from-football-on-head-injuries-204451449.html;_ylt=AwrC1C2TPcxX4ywAgRxNbK5_;_ylu=X3oDMTBya2tiZ2YyBGNvbG8DYmYxBHBvcwM1BHZ0aWQDBHNlYwNzYw--.

100 Ex. 94.

101 *Id.*

102 Comstock Declaration, ¶129.

103 Ex. 95.

findings consistent with this conclusion; NHL hockey and NFL football are strikingly similar.[104]

E. The NHL Failed to Warn Players of the Long-Term Risks of Head Impacts.

1. NHL Executives Admit That No Warnings Were Provided Prior to 1997.

While the NHL eagerly fostered brutal violence in the League to meet consumer demand, it utterly failed to address the concomitant risk to players' long-term neurological health such violence inevitably imposed. Despite longstanding medical literature warning of the long-term neurodegenerative effects of head trauma, by its own admission, the NHL did virtually ***nothing*** to protect players' brains before 1997,[105] fostering the culture of "if you can skate, you can play." Colin Campbell acknowledged: "[concussions] were treated differently back then. It was 'no plaster, no stiches, then you played.' Actually it was 'no plaster, you can play.'"[106] Notwithstanding the fact that "concussion" was a known medical diagnosis of brain trauma as far back as the late 19th Century,[107] NHL executives often reminisced about their lack of knowledge about concussion risks during their own playing careers, covering a span from 1973-2009:

- Kris King: "[I]n my era … no one really knew what a concussion was … [m]any times we would play through these exact incidents because we

[104] Declaration of Thomas Blaine Hoshizaki, Ph.D. ("Hoshizaki Declaration"), filed contemporaneously, §IV.D.

[105] Ex. 18; Bettman Dep. 30:2-32:1-12, Ex. 90.

[106] Ex. 96 at NHL0230124.

[107] Casper Declaration, ¶¶12, 88-90.

didn't want to lose our place in the lineup. Tough for us to say publicly, but this is the absolute way it use [sic] to be."[108]

- Shanahan: "The overwhelming majority of players and GMs want a safer game – especially when it comes to potential head shots and concussions. They know more than when you and I played and we dodged bullets and played through concussions."[109]

- Shanahan: "Gone are the days u sat on the bench and barked at the trainer that u were fine and went right back out onto the ice."[110]

- Burke: "Coming back to the bench after you got your bell rung, you puked, you missed one shift, you waited until the cobwebs cleared, then the trainer gave you one of those little ammonia sniffers …. And you went back out."[111]

2. NHL Policies Directly Undermined Player Health and Concussion Science.

Having begun a study of NHL concussions in 1997, the NHL did not produce a published report until 2011.[112] Despite the Concussion Working Group's goal being "to protect the health and safety of the players with publication of research,"[113] its study's conclusion was modified before publication. NHL ***attorney*** Grand edited the publication twelve separate times.[114] What started out as a conclusion that it was "necessary" to

[108] Ex. 97.

[109] Ex. 98.

[110] Ex. 99.

[111] Ex. 57.

[112] Ex. 100.

[113] Ex. 101.

[114] Ex. 102.

remove concussed players from the game in which they suffered the injury,[115] was diluted to "prudent precautionary medical decision"[116] and finally, in the published article, to the softer still: "more conservative or precautionary measures should be taken in the immediate postconcussion period…."[117] [redacted]

By deliberately and systematically limiting public access to concussion data, controlling how the data was analyzed and used, and exercising oversight and editorial input into the study drafts,[119] the NHL quietly neutered the value of its study because, according [redacted] To make matters worse, the NHL formally adopted a weak "return to play protocol" that it knew was followed – at best – sporadically.[121] Instead of promoting rest following a concussion, a foundation of concussion therapy,[122]

[115] Ex. 103; Ex. 104.

[116] Ex. 105.

[117] Ex. 100; Ex. 106.

[118] Ex. 107 at 0000029, 0000031.

[119] Ex. 108 at NHL2037515-18; Ex. 109.

[120] Ex. 110.

[121] Ex. 102; Ex. 111.

[122] Declaration of Robert C. Cantu, M.A., M.D., FACS, FAANS, FICS, FACSM ("Cantu Declaration"), filed contemporaneously, §IV.A.6.

[redacted]

Echemendia concurred, noting that a return to play decision is "a combination of risk benefit analyses .... It's not a simple decision of, 'Do you have symptoms or don't you have symptoms?' There are a lot of other factors that come into play - who's the player, what team are you playing, what game is this? All those factors do come into play."[124] This was the case with many NHL teams.[125] Thus, it comes as no surprise that from 2006 to 2014, ***101 of 186 players who showed visible signs of concussions returned to play later in the same game***.[126]

3. The NHL Gave Inadequate Warnings That Were Contradicted by Public Statements.

The NHL's first mention to players about the potential risks of "concussion" or "mild brain injury" was not until 1997,[127] [redacted]

[123] Ex. 112.

[124] Ex. 113.

[125] Ex. 70 at NHL0200292-93.

[126] Ex. 114.

[127] As of July 21, 2016, there were approximately 5,145 retired NHL players – 2,285 ***or 44%*** of which retired in the NHL prior to 1997 and are still living. As such, at least 44% of retired NHL players never received this or any purported warning – however inadequate. *See* Ex. 115. This document was created by researching the current status of each player included on the NHL's "All-Time" statistics list. The NHL's "All-Time"

[redacted] Indeed the NHL still denies ***any*** evidence of a causal link between playing in the NHL and long-term neurological diseases to this day.[130]

In 2001,[131] the NHL circulated a handout discussing "brain injuries" that, like many that followed, contained no mention of potential negative impacts of repeated concussion or brain injury, but instead focused only on head injuries resulting from improper equipment use.[132] Penguins team physician Chip Burke criticized a 2009 Concussions in Hockey Educational DVD, stating: "There are no details given about the

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statistics list can be found at NHL.COM, http://www.nhl.com/stats/ (last visited Dec. 6, 2016).

[128] Ex. 116 at NHL2201624.

[129] *Id*.; Deposition Transcript of Alan Finlayson, June 16, 2016, 230:18-231:12, Ex. 117.

[130] *See* Dkt. 561-1

[131] As of July 21, 2016, approximately 2,635 ***or 51%*** of living retired NHL players played in the NHL prior to 2001. As such, at least 51% of retired NHL players never received this purported warning. *See* Ex. 115.

[132] *See, e.g.*, Ex. 118; Ex. 119.

long term consequences of concussion such as dementia, depression, suicide, etc."[133] Summarizing the NHL's willful blindness, Echemendia responded: "We ***chose*** not to include any information for which there is no consensus in the scientific community."[134] The NHL's public statements undermined further the League's half-hearted discussion of risks.

In 2011, Bettman infamously stated that the repeat deaths of NHL enforcers represented a "limited data base," cautioning not to "jump to conclusions" because there is a "gap in the science" which is "in its infancy."[135] Bettman consistently minimized the true risks associated with repeated blows to the head.[136] Other instances of public denial of risks of long-term NDDCs are abundant.[137]

[redacted]

Examples include:

[133] Ex. 120.

[134] *Id.*

[135] *Id.*

[136] Ex. 121.

[137] *See* Dkt. 561-1; Ex. 122.

[138] Ex. 123.

[139] Ex. 124.

[140] Ex. 125.

- The President of the Canadian Medical Association called on the NHL to reduce violence in the sport. NHL VP of Media Relations, Frank Brown, referred to such comments as "imbecilic rants by dumbass doctors who have no idea what they're talking about."[141]

- Buffalo Sabres head coach Ted Nolan called on the NHL to take concussions more seriously, earning a $25,000 fine and public reprimand from the NHL.[142]

- [redacted]

- When one trainer highlighted the lack of player education regarding concussions and inconsistent refereeing, he pleaded "[p]lease do not shoot the messenger"; Colin Campbell called him "an absolute freaking idiot!"[144]

[redacted]

4. The NHL Has Opposed Study of Retiree Health.

Much of the NHL's defense to its lack of action regarding head trauma to its players is that no causal connection has been conclusively proven between repeated head

[141] Ex. 126.

[142] Ex. 127.

[143] Ex. 128.

[144] Ex. 129.

[145] *See, e.g.*, Deposition Transcript of Mario Lemieux, Dec. 17, 2015, 43:8-18; 61:5-13, Ex. 130; Deposition Transcript of C. Burke, May 15, 2015, 97:1-14, 97:16-25-98:1-3, Ex. 131.

hits and CTE.[146] [redacted] Guskiewicz, whose 2005 study of NFL retirees had shown marked neurocognitive deterioration,[150] also proposed an NHL retiree study and the NHL refused.[151]

Contrary to the NHL blaming the NHLPA for blocking a retiree study,[152] the NHLPA actually supported it.[153] [redacted] Grand recommended that the NHL "***leave the dementia issues to the NFL!***"[155]

[146] Dkt. 561 at 2.

[147] Ex. 132.

[148] Ex. 133.

[149] Ex. 134; Ex. 132; Ex. 135.

[150] Ex. 94.

[151] Ex. 113.

[152] *See* Grand Dep. 50:13-51:11, 56:2-12, 215:2-24, Ex. 91; Daly Dep. 439:1-14, Ex. 5.

[153] *See* Ex. 79; Ex. 136; *see also* Daly Dep. 437:15-438:25, Ex. 5; Deposition Transcript of Dr. John Rizos, Aug. 12, 2016, 219:14-220:13, Ex. 137.

[154] Ex. 138.

The NHL's "Task Force" to study long-term effects, established in 2013,[156] has yet to develop a study, much less perform one.[157]

F. Retired NHL Players Have Been Uniformly Harmed by the NHL.

1. All Members of the Classes Have a Present Injury.

Each member of the Classes has been harmed by the NHL's failure to warn them of the long-term risks associated with head impacts, and is at an increased risk of developing an NDDC. Dr. Thomas Blaine Hoshizaki,[158] Plaintiffs' expert in the study of helmets and the biomechanical forces involved in head impacts, and Dr. Robert C. Cantu[159] – arguably the nation's leading expert on athletic brain trauma and resulting consequences – show that following a concussive or subconcussive blow, the brain's store of white matter cells is ***permanently*** diminished, increasing the brain's susceptibility to developing an NDDC.[160] This white matter cell death further exacerbates the brain's natural decline as a result of aging, leading to earlier onset of various neuropathologies.[161]

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[155] Ex. 139.

[156] Ex. 140.

[157] *See* Grand Dep. 234:17-235:4, Ex. 91.

[158] Hoshizaki Declaration, §§IV.B-C.

[159] Cantu Declaration, §IV.A.5.

[160] *Id.*

[161] *Id.*

Dr. Hoshizaki analyzed head impacts in a total of 120 games: 30 ordinary NHL games in each of the 1986-87, 1995-96, 2003-04, and 2013-14 seasons, with 15 games obtained from the first half of each season, and 15 from the second half of each season.[162] Based on the speeds and impact angles measured precisely from the videos, he was able to recreate head impacts in his lab and measure the strain those impacts place on the brain.[163] As a result of his video and lab analysis, Dr. Hoshizaki has opined that the average NHL player received between 1.19 and 2.95 damaging head blows per game (at a level of strain sufficient to cause permanent white matter damage) ***as a conservative figure***.[164] Thus, ***all*** members of the Classes have received a present, permanent injury as a result of the head impacts sustained during their NHL playing careers.

2. All Members of the Classes Are at an Increased Risk of Developing an NDDC.

Due to the NHL's negligence, and the head hits accumulated during each retired player's NHL career, Plaintiffs' experts have opined that they are at a heightened risk of developing NDDCs. This is primarily attributed to the aforementioned white matter cell death and concomitant depletion of the brain's reserve cells necessary to resist the onset of neuropathology,[165] and also the adverse effects associated with the release of tau

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[162] Hoshizaki Declaration, §IV.D.

[163] *Id.*

[164] *Id.*

[165] Cantu Declaration, §IV.A.5.

protein.[166] Though the precise mechanism of CTE's effects on the brain is still the subject of study, the heightened risks of NDDCs are well-documented and clear.[167]

Dr. Comstock, an epidemiologist nationally recognized for her expertise in sports-related concussion,[168] has examined the heightened risks associated with concussive and subconcussive blows. She has concluded that members of the Classes are at heightened risk, as compared to the general population, of developing depression,[169] violent mood disorders,[170] suicidality,[171] dementia,[172] as well as CTE and other neurodegenerative disease.[173] This is caused by the prevalence of avoidable head hits, with insufficient recovery, that the members of the Classes are exposed to.[174]

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[166] It has been proposed that the accumulation of disrupted protein in CTE cases may result as the brain's ability to clear waste from the brain parenchyma is overwhelmed or compromised, ultimately leading to cell degeneration and death. Further, as levels of tau protein remain elevated within a chronic state and accumulation of perivascular tau takes place, blood-brain barrier dysfunction results, potentially exacerbating pathology. Hoshizaki Declaration, ¶47; Cantu Declaration, §IV.E.3.

[167] *Id.*

[168] Comstock Declaration, ¶¶1-16.

[169] *Id.* §V.F.4.

[170] *Id.* §V.F.3.

[171] *Id.* §V.F.5.

[172] *Id.* §V.F.2.

[173] *Id.* §V.F.1; *see also* Cantu Declaration, §IV.E.3.

[174] Comstock Declaration, ¶¶131-132.

III. ARGUMENT

A. The Proposed Classes

Plaintiffs move to certify for trial the following Classes under Fed. R. Civ. P. 23(b)(2) and 23(c)(4), consisting of individuals who meet the following definitions:

Class 1: All living Retired NHL Hockey Players.[175]

Class 2: All Retired NHL Hockey Players (or representative claimants if they are deceased) who have been clinically diagnosed with an NDDC.

Plaintiffs request certification of Class 1 under Rule 23(b)(2) to establish the NHL's liability to provide equitable medical monitoring relief to all living Retired Players. Plaintiffs request certification of Class 2 under Rule 23(c)(4) for the issues of: (1) duty of care and (2) breach of such duty/failure to warn, and other common issues of fact.

Plaintiffs Dave Christian ("Christian") and Reed Larson ("Larson") move for Rule 23(b)(2) certification under their choice-of-law theory and for their appointment as representatives of Class 1. Because Christian and Larson originally filed their class action complaints in Minnesota, the Court must apply Minnesota's choice-of-law rules to their motion for class certification. Under those rules, the Court should apply New York law to the issue of liability (*i.e.*, duty and breach) and Minnesota law to the issue of the remedy sought (medical monitoring).

[175] "Retired NHL Hockey Player" or "Retired Player" means any NHL hockey player who played in one or more preseason, regular season, or postseason NHL game with an NHL Member Club, and who retired from playing professional hockey with the NHL or any of its NHL Member Clubs.

Alternatively, Plaintiffs Christian, Larson, Bernie Nicholls ("Nicholls"), and Daniel LaCouture ("LaCouture") ask that the Court certify Class 1 under their state-law grouping theory because very few conflicts of substantive law are relevant to the claims and common evidence. For example, because living Retired Players' increased risk of developing an NDDC is dependent upon having experienced head impacts (exposure) that have necessarily caused white matter damage and/or tau protein release (present injury), the distinction between exposure-only states and present-injury states is irrelevant, as Plaintiffs already meet the higher standard.

Finally, Gary Leeman ("Leeman") and the Estate of Lawrence Zeidel ("Zeidel") move for Rule 23(c)(4) certification, and for their appointment as representatives of Class 2 as to the particular legal issues of duty of care and breach of such duty, including the failure to warn, and factual issues relevant to whether the head impacts class members experienced can cause latently-developed NDDCs.

B. Rule 23 Was Designed to Facilitate Aggregating Common Issues.

The "principal purpose" of Rule 23 is "the efficiency and economy of litigation." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). A class action is "peculiarly appropriate" when a case raises legal issues "common to the class as a whole," because in such a case Rule 23 provides an economical vehicle for the resolution of multiple common claims. *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979).

Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). To that end, "[w]hile disputes about

Rule 23 criteria may overlap with questions going to the merits of the case, the district court should not resolve the merits of the case at class certification." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 617 (8th Cir. 2011); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013).

Federal courts have "broad discretion in determining whether to certify a class." *Zurn*, 644 F.3d at 616; *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 568 (D. Minn. 2014) (Nelson, J.). Moreover, "[w]hen a question arises as to whether certification is appropriate, the court should give the benefit of the doubt to approving the class." *Karsjens v. Jesson*, 283 F.R.D. 514, 517 (D. Minn. 2012).

Certification of a class requires plaintiffs to meet the numerosity, commonality, typicality, and adequacy elements of Rule 23(a) and one of three provisions of Rule 23(b). Here, Plaintiffs move to certify Class 1 under Rule 23(b)(2), which requires a showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Likewise, Plaintiffs seek to certify Class 2 under Rule 23(c)(4), which permits "when appropriate, an action ... be brought or maintained as a class action with respect to particular issues.".

C. Plaintiffs Have Met All Requirements of Rule 23(a) and Ascertainability.

1. Numerosity Is Satisfied.

Rule 23(a)(1) requires showing the proposed class is "so numerous that joinder of all members is impracticable." No bright-line rule determines numerosity. Courts "look at the particular circumstances of each case to determine whether this requirement has

been met." *Alberts v. Nash Finch Co.*, 245 F.R.D. 399, 409 (D. Minn. 2007). A number of factors are relevant, "the most obvious factor being the size of the proposed class." *Krueger*, 304 F.R.D. at 569. "[T]he court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members." *Id.*

To satisfy numerosity, a plaintiff need not show that joinder is impossible, only that joinder of all members would be difficult. *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 574 (D. Minn. 1995). "A putative class exceeding 40 members is sufficiently large to make joinder impracticable." *Alberts*, 245 F.R.D. at 409; *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 560 (8th Cir. 1982) (certifying subclasses which consisted of 74 and 53 members).

Here, the proposed Classes consist of individuals who are all former NHL players. Currently, there are over 5,100 Retired Players who played in the NHL, the majority of whom are living and members of Class 1.[176] As to Class 2, numerous studies have demonstrated that victims of concussive and subconcussive blows, including former athletes, are significantly more likely to suffer from, depression, suicidality, CTE, and dementia.[177] Though impossible to estimate with precise detail, the number of Class 2 members who have been clinically diagnosed with an NDDC clearly exceeds the 0.78% (40/5100) threshold necessary for a 40 member class, for the presumption that the

[176] Ex. 115.

[177] Comstock Declaration, §V.G.

numerosity requirement has been met.[178] Accordingly, Plaintiffs meet Rule 23's numerosity requirement.

2. Commonality Is Satisfied.

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." A common question is one "for which a prima facie case can be established through common evidence." *Zurn*, 644 F.3d at 618. "A finding of commonality does not require that all class members share identical claims" or that "every question of law or fact must be common to every member of the class." *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 2004 WL 909741, at *1 (D. Minn. Apr. 28, 2004). "Rule 23(a)(2) requires only that the course of conduct giving rise to a cause of action affects all class members, and that at least one of the elements of that cause of action is shared by all class members." *Mooney v. Allianz Life Ins. Co.*, 2007 WL 128841, at *6 (D. Minn. Jan. 12, 2007). "[E]ven a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

To satisfy Rule 23's commonality requirement, class claims "must depend upon a common contention ... of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. A key consideration is whether a class action can "generate common answers apt to drive the resolution of the litigation." *Id.* "If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in

[178] *Id.*

settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (Posner, J.); *see also In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014) (Easterbrook, J.).

Applying these principles, the commonality requirement is met here. Many common questions and answers form the crux of this litigation, including:

- whether the NHL owed a duty of care to the Classes;
- whether the NHL's duty of care to the Classes included the duty to warn the Classes of, and protect them from, the long-term health risks and consequences of concussive and subconcussive impacts;
- whether the NHL breached its duty to warn the Classes of, and protect them from, such risks and consequences;
- whether concussive and subconcussive impacts experienced in NHL hockey create a risk of, and can cause, long-term or permanent neurological damage, including the injuries claimed herein;
- whether medical monitoring and early detection will provide benefits to Class 1 members; and
- whether an epidemiological study using data from the medical monitoring cohort will benefit Class 1 members.

The Third Circuit recently reaffirmed commonality in the concussion litigation against the NFL – with many analogous issues – finding:

> critical factual questions were common to all class members, including whether the NFL Parties knew and suppressed information about the risks of concussive hits, as well as causation questions about whether concussive hits increase the likelihood that retired players will develop conditions that lead to Qualifying Diagnoses. [The District Court] also found common legal questions, including the nature and extent of any duty owed to retired players by the NFL Parties, and whether labor preemption, workers' compensation, or some affirmative defense would bar their claims.

In re NFL Players Concussion Injury Litig., 821 F.3d 410, 427 (3d Cir. 2016) ("*NFL Players*").

Here, commonality is supported because the NHL "allegedly injured retired players through the same course of conduct." *Id.*; *see also Bouaphakeo v. Tyson Foods Inc*., 765 F.3d 791, 797 (8th Cir. 2014), *aff'd*, 136 S. Ct. 1036, 1050 (2016) (finding commonality where defendant "had a specific company policy ... that applied to all class members"); *Krueger*, 304 F.R.D. at 572 (finding commonality where "Defendants' decisions in this case ... were the same for each putative class member").

As discussed below, the elements of common-law negligence and medical-monitoring relief are readily established by relying on New York and Minnesota law, respectively, and otherwise are nearly identical in certain grouped jurisdictions and can be established with common evidence and legal rules. *See infra*, §III.D.[179] Plaintiffs' negligence claim focuses on the NHL's duty to members of the Classes and its breach thereof, which Plaintiffs will prove with common evidence for all members of the Classes.[180] Plaintiffs also present expert testimony concluding that the NHL violated its duty of care to all members of the Classes.[181]

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[179] Exs. 141, 142.

[180] Despite the NHL's assertions that 100% cause-and-effect proof is required to trigger the duty to warn, "[a] lack of statistically significant data does not mean that medical experts have no reliable basis for inferring a causal link between a drug and adverse events." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 40 (2011).

[181] Casper Declaration, §VI.

3. Typicality Is Satisfied.

Typicality under Fed. R. Civ. P. 23(a)(3) means there are "other members of the class who have the same or similar grievances as the plaintiff." *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1997). The burden of establishing typicality is "fairly easily met so long as other class members have claims similar to the named plaintiff." *Alpern v. UtilCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Id.*; *accord Krueger*, 304 F.R.D. at 573. "The typicality criterion focuses on whether there exists a relationship between the plaintiffs' claims and the claims alleged on behalf of the class." WILLIAM RUBENSTEIN, ET AL., NEWBERG ON CLASS ACTIONS §3:13 (1985).

In *NFL Players*, 821 F.3d at 428, the Third Circuit reaffirmed that:

> [C]lass members need not "share identical claims," and "cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims."

As in *NFL Players*, Plaintiffs' claims here (1) arise from the same practice or course of conduct by the NHL (namely its failure to warn the Classes of the long-term health risks and consequences of concussive and subconcussive impacts) that gives rise to the members of the Classes' claims, and (2) are based on the same legal theory as the Classes' claims:

- Plaintiffs[182] seek to be representatives of Class 1 and seek medical monitoring to detect early onset of any NDDC. These claims are typical of the claims of all Class 1 members.

- Plaintiffs Leeman and Zeidel seek to represent Class 2 and seek certification of a (c)(4) class as to common liability issues and common issues of fact. This claim is typical of the claims of all members of Class 2.

Plaintiffs' claims are typical of those of their respective Classes, and the typicality prerequisite for class certification is met.

4. Adequacy Is Satisfied.

Fed. R. Civ. P. 23(a)(4) requires representative parties to "fairly and adequately protect the interests of the class." This requirement has two prongs: (1) the representatives' attorney must be qualified and willing and able to prosecute the case competently and vigorously; and (2) the named plaintiffs' interests must not diverge from the interests of the class as a whole. *See Krueger*, 304 F.R.D. at 574. Plaintiffs' counsel have demonstrated experience in handling complex class and mass tort actions, are knowledgeable of the applicable law, and have the resources available for representing the Classes.[183] Moreover, Plaintiffs and their counsel have shown both a willingness and ability to pursue vigorously the claims of the Classes they seek to represent, and no disabling intra-class conflict exists. All Plaintiffs have testified in their respective depositions as to their involvement with counsel throughout all critical stages of the

[182] Christian and Larson move for a finding of commonality of legal questions that would remain if their choice-of-law theory is adopted. In the alternative, Christian, Larson, Nicholls, and LaCouture move for a finding of commonality based on grouping of similar state legal standards.

[183] *See* Dkt. 18.

litigation,[184] their knowledge of the legal theories being presented and remedies being sought,[185] and have further been subject to intrusive questions examining their mental health[186] as well as both relationship and family history.[187] All living Plaintiffs have played in hundreds of NHL hockey games ***each***, far exceeding the minimum exposure to head impacts necessary to qualify for medical monitoring, [188] and both Leeman and Zeidel have been diagnosed with an NDDC necessary to qualify for money damages.[189] Leeman, Nicholls, Larson, and LaCouture have further undergone strenuous full-day independent medical examinations.[190]

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[184] Deposition Transcript of Reed D. Larson, Apr. 20, 2016 ("Larson Dep.") 114:7-116:6, Ex. 143; Deposition Transcript of Bernie Nicholls, Mar. 10, 2016 ("Nicholls Dep.") 17:7-18:2, Ex. 144; Deposition Transcript of David W. Christian, Apr. 14, 2016 ("Christian Dep.") 69:14-77:4, Ex. 145; Deposition Transcript of Daniel S. LaCouture, Aug. 17, 2016 ("LaCouture Dep.") 14:1-16:22, Ex. 146; Deposition Transcript of Gary Leeman, Sept. 8, 2016, Nov. 21, 2016 ("Leeman Dep.") 201:4-16; 330:18-333:14, Ex. 147.

[185] Larson Dep. 167:3-170:3, Ex. 143; Nicholls Dep. 62:7-64:16, Ex. 144; Christian Dep. 91:17-94:21, Ex. 145; LaCouture Dep. 46:17-48:4, Ex. 146; Leeman Dep. 240:13-16; 368:20-376:22, Ex. 147.

[186] Larson Dep. 39:3-87:11, Ex. 143; Nicholls Dep. 18:3-23:15, Ex. 144; Christian Dep. 99:18-101:16, Ex. 145; LaCouture Dep. 20:12-33:9, Ex. 146; Leeman Dep., 113:10-124:3; 147:5-152:4; 270:2-275:1; 306:2-309:22, Ex. 147.

[187] Larson Dep. 84:8-93:5, Ex. 143; Nicholls Dep. 107:1-109: 115:7, Ex. 144; Christian Dep. 51:4-63:13, Ex. 145; LaCouture Dep. 17:1-20:11, Ex. 146; Leeman Dep. 66:2-72:5, 164:19-166:11; 278:4-300:17, Ex. 147.

[188] *See* Hoshizaki Declaration, §IV.D.

[189] Ex. 148; Ex. 149.

[190] The NHL has manufactured days of complex medical tests to access Plaintiffs' neurological state while publicly denying any way exists to diagnose or treat such conditions and claiming that even if there were, the players are not entitled to any medical monitoring or treatment for such conditions.

Plaintiffs' interests are indisputably aligned with those of absent members of the Classes. All members of the Classes are retired NHL players who, like Plaintiffs, have or had suffered repetitive head trauma in the NHL, and have a heightened risk of developing – or have already developed – an NDDC as a result.[191] *Bentley v. Honeywell Int'l*, 223 F.R.D. 471, 485 (S.D. Ohio 2004) (degree of harm suffered by named plaintiffs and other class members would not negate adequacy because harm was same type for all class members).

No legitimate dispute exists as to proposed class counsel's experience, knowledge, available resources, and vigorous prosecution of this matter at arm's-length from Defendant.[192] Finally, the Third Circuit's rejection of allegations of a conflict of interest between retired players with present injuries and those with sub-cellular injuries justifying medical monitoring in *NFL Players* is on point:

> [The District Court] explained the incentives of class members were aligned because they "allegedly were injured by the same scheme: the NFL … negligently and fraudulently de-emphasized the medical effects of concussions to keep [r]etired [p]layers in games." Moreover, the two subclasses of players guarded against any *Amchem* conflict of interest.
>
> * * *
>
> Some objectors argue that this class action suffers from a conflict of interest between present and future injury plaintiffs. But simply put, this case is not *Amchem*. The most important distinction is that class counsel here took

[191] Comstock Declaration, §V.F.

[192] Plaintiffs request that the Court appoint Plaintiffs' Co-Lead Counsel, Zimmerman Reed, LLP, Robbins Geller Rudman & Dowd LLP, and Silverman Thompson Slutkin White LLC, as Class Counsel, pursuant to Rule 23(g). Co-Lead Counsel have demonstrated over the last two years that they are more than qualified to represent the Classes.

> *Amchem* into account by using the subclass structure to protect the sometimes divergent interests of the retired players….

821 F.3d at 432. This case has the same "significant" structural protection in *NFL Players* and adequacy is therefore met.[193]

5. The Classes Are Ascertainable.

While the Eighth Circuit does not address ascertainability "as a separate, preliminary requirement" it recognizes that Rule 23 requires a determination "that a class must be adequately defined and clearly ascertainable." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016). The Eighth Circuit and its district courts examine whether a proposed class is ascertainable through the use of objective criteria. *See Labrier v. State Farm Fire & Cas. Co.*, 315 F.R.D. 503, 512 (W.D. Mo. 2016); *Krueger*, 304 F.R.D. at 579.

Here, Plaintiffs move to certify a Class of all living Retired Players and a Class comprising all Retired Players who have been clinically diagnosed with an NDDC. Whether an individual is considered a Retired Player is an easily verified objective criterion. The names, retirement year, and living status of every former NHL player are readily available from NHL statistics available from public sources, and from information

[193] The NHL incorrectly suggests that if a class were certified, absent class members with pending lawsuits seeking compensation for current personal injuries would be precluded by principles of *res judicata* from pursuing those claims, making their interests antagonistic to both the named class representatives and class counsel. *See* Dkt. 454 at 3-6. Rule 23 expressly permits claim splitting in the class context. *See* 7B CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1790 (2d ed. 1990) ("The theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member.").

on the member Clubs' and other NHL-related websites. Accordingly, Plaintiffs compiled a list which easily identifies all of living Retired Players.[194]

Determining whether a Retired Player has been clinically diagnosed with an NDDC, to determine Class 2 membership, can be objectively ascertained from the players' medical records. *NFL Players*, 307 F.R.D. 351, 367-68 (E.D. Pa. 2015), *aff'd*, 821 F.3d 410 (3d Cir. 2016); *see also In re Diet Drugs Prods. Liab. Litig.*, 1999 WL 673066, at *13 (E.D. Pa. Aug. 26, 1999) (fact sheets and medical records confirmed membership of class that had taken the subject drugs, and any subclass members not entitled to medical monitoring relief would "be readily identifiable" from required registration forms and supporting documentation); *M.G. v. N.Y. City Dep't of Educ.*, 162 F. Supp. 3d 216, 238 (S.D.N.Y. Jan. 4, 2016) (class definition that included a diagnosis or classification of autism was ascertainable).

D. Because Minnesota Medical Monitoring Law and New York Law with Regard to Tort Duties Applies to All Players, Common Questions of Law Will Drive the Litigation.

Further supporting the determination that proposed Class 1 presents common issues of law that will drive the litigation, Plaintiffs Christian and Larson propose to significantly narrow the universe of possible applicable legal standards to the choice of Minnesota's remedial medical monitoring law and New York's substantive law regarding tort duties. The availability of a single state's law concerning these issues significantly supports certification.

[194] Ex. 115.

1. Applying Minnesota and New York Law Is Constitutionally Permissible.

The application of Minnesota law for purposes of medical monitoring relief, and New York law for purposes of liability, is clearly constitutional. State laws may have extraterritorial effect so long as the state has "a significant contact or significant aggregation of contacts, creating state interest, such that choice of its law is neither arbitrary nor fundamentally unfair." *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 580-81 (8th Cir. 1981), *aff'd*, 454 U.S. 1071 (1981). When the significant contacts test is met, "the forum state's power to apply its own law is unquestionable." *Id.* at 582. While the Court must satisfy itself that Minnesota has sufficient contacts with each Class member's claim, *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005), the Constitution creates only "modest restrictions" on the forum state's autonomy to choose the law to apply to a claim. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

Minnesota has significant contacts with each retired player's claim. The NHL has benefitted tremendously by maintaining significant presence, activities, and franchises in Minnesota for 50 years. New York also has sufficient contacts with this litigation, as the NHL is domiciled there and made numerous decisions there relevant to the Class' claims, including the decision not to warn players of the risks of repetitive head trauma. Applying New York law to the NHL's conduct is eminently fair. *See Phillips*, 472 U.S. at 822 (expectation of parties element of fairness in choice of law).

Minnesota Contacts: The NHL created the Minnesota North Stars team franchise in Minnesota in 1966.[195] Players from ***every*** NHL team traveled to and played games in Minnesota from 1967 through the 1992-93 season, until the Stars moved to Texas.

From 1994-1999, NHL clubs drafted numerous players every year from various Minnesota cities and universities.[196] In 1994, the NHL designated the Target Center in Minneapolis as the "neutral site" for several of its clubs' games.[197] A 1995 effort to relocate the Winnipeg Jets to Minnesota failed,[198] during which time Bettman gave Minnesota a month to acquire the Jets, stating, "[i]t works better for ***us*** to be able to come back to Minnesota."[199] In 1996, a Minnesota investment group applied for an NHL expansion team in St. Paul.[200]

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[195] *1967 NORTH STARS INAUGURAL PRE-SEASON HISTORY & JERSEYS*, VINTAGE MINNESOTA HOCKEY, http://history.vintagemnhockey.com/page/show/1166928-1967-north-stars-inaugural-pre-season-history-and-jerseys (last visited Dec. 6, 2016).

[196] *NHL & WHA Draft History*, http://www.hockeydb.com/ihdb/draft/ (last visited Dec. 6, 2016).

[197] *See 1993-94 NHL Season Schedule and Results*, HOCKEY-REFERENCE.COM, http://www.hockey-reference.com/leagues/NHL_1994_games.html (last visited Dec. 6, 2016); *1993-94 NHL season*, WIKIPEDIA.COM, http://en.wikipedia.org/wiki/1993%E2%80%9394_NHL_season (last visited Dec. 6, 2016).

[198] *HOCKEY; Winnipeg Jets Migrating South to Phoenix*, N.Y. TIMES, Dec. 5, 1995, http://www.nytimes.com/1995/12/05/sports/hockey-winnipeg-jets-migrating-south-to-phoenix.html.

[199] Associated Press, *NHL Presses Minnesota, Bettman Wants Answer About Jets' Future*, GLOBE & MAIL, Oct. 12, 1995.

[200] *Resources on Minnesota Issues*, *NHL Hockey in Minnesota and the Xcel Energy Center*, MINN. LEGISLATIVE REFERENCE LIBRARY (Oct. 2014), http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=hockey.

In 1997, Minnesota investors and government officials presented to the NHL regarding an expansion team,[201] and the NHL ultimately approved a new expansion franchise in St. Paul, Minnesota.[202] The NHL mandated that the new Minnesota Wild procure 12,000 ticket deposits by April 2000.[203] Over the next three years, the Wild complied, actively marketing and even developing a new stadium in St. Paul.[204]

In 1998, Minnesota provided an interest free loan of $65 million in new arena costs, with St. Paul contributing $65 million.[205] In October 11, 2000, NHL teams began playing regular season games in Minnesota, and since then, ***every*** NHL team has continually done so.[206]

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[201] Ron Lesko, *St. Paul's NHL Proposal Losing Steam*, AP NEWS ARCHIVE (Jan. 9, 1997, 12:45 AM EST), http://www.apnewsarchive.com/1997/St-Paul-s-NHL-proposal-losing-steam/id-b4288040f4a3d20d4106b8ab2c2f9eb1; *N.H.L. Names 4 Cities For Its New Franchises*, N.Y. TIMES, June 18, 1997, http://www.nytimes.com/1997/06/18/sports/nhl-names-4-cities-for-its-new-franchises.html.

[202] Michael Stainkamp, *A Brief History: Minnesota Wild*, NHL.COM (Aug. 16, 2010, 3:00 AM), http://www.nhl.com/ice/news.htm?id=535921; *Resources on Minnesota Issues, NHL Hockey in Minnesota and the Xcel Energy Center*, MINN. LEGISLATIVE REFERENCE LIBRARY (Oct. 2014), http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=hockey.

[203] Glen Andresen, *The Minnesota Wild Turns 10*, WILD.NHL.COM (June 25, 2007, 7:51 AM CT), http://wild.nhl.com/club/news.htm?id=485351.

[204] Zach Baliva, *Minnesota Wild Goes Wild*, PROFILE MAG., April/May/June 2014, http://profilemagazine.com/2014/minnesota-wild/.

[205] *Resources on Minnesota Issues, NHL Hockey in Minnesota and the Xcel Energy Center*, MINN. LEGISLATIVE REFERENCE LIBRARY (Oct. 2014), http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=hockey.

[206] *Philadelphia Flyers at Minnesota Wild Box Score*, HOCKEY REFERENCE, http://www.hockey-reference.com/boxscores/200010110MIN.html (last visited Dec. 6, 2016).

New York Contacts: The NHL is incorporated ***and*** has its principal place of business in New York. The NHL's existence, and the rights of its shareholders, are governed by New York law. The NHL's corporate domicile alone comprises "substantial contacts" with New York that give rise to "significant state interests" in all of the claims against the NHL, including New York's interest in regulating and ensuring its laws are obeyed by one of its domestic corporations, and that all persons doing business with New York firms may rely on their integrity and compliance with local law. *See, e.g.*, *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 93 (1987); *Ferris, Baker Watts, Inc. v. Deutsche Bank Sec.*, 2004 WL 2501563, at *5 (D. Minn. Nov. 5, 2004).

Additionally, virtually all of the corporate acts and decisions by the NHL implicated by each Class member's claims were New York-based. The NHL's insistence on maintaining the fastest, most violent professional hockey league on Earth and its concomitant failure to act reasonably with regard to informing players that participating in such a league substantially increased their risk of developing irreversible NDDCs, resulted in every Class member's exposure to subcellular damage in every NHL-sanctioned arena in the United States. Where the defendant's relevant conduct emanated from a state, that state has, at a minimum, sufficient contacts with the litigation for purposes of the Due Process Clause. *In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482 (D. Minn. 2015); *Mooney v. Allianz Life Ins. Co.*, 244 F.R.D. 531, 535 (D. Minn. 2007); *Simon v. Philip Morris*, 124 F. Supp. 2d 46, 70 (E.D.N.Y. 2000).

Both Minnesota and New York have sufficient contacts with all Class members' claims against the NHL, making application of either state's laws permissible.

2. Minnesota's Choice-of-Law Rules Dictate Application of Minnesota Medical Monitoring Law and New York Duty of Care Principles.

Once the Court determines which law ***may*** constitutionally apply, the next step is to determine which state's law ***will*** apply. Minnesota's choice-of-law rules require Minnesota medical monitoring remedial law to apply, and support applying New York's substantive duty of care standards.

Christian and Larson filed their class action complaints in Minnesota on behalf of all Retired Players on April 15, 2014. Their class certification motion requires the Court to apply Minnesota's choice-of-laws rules. *See Ferens v. John Deere Co.*, 494 U.S. 516, 524 (1990) (transferee court must apply the choice-of-law rules of the state in which the action was filed); *In re Panacryl Sutures Prods. Liab. Cases*, 263 F.R.D. 312, 318 (E.D.N.C. 2009) (MDL court applied choice-of-law rules of single state where "prospective *class representatives* filed their claims" in context of proposed national class certification motion).

Minnesota courts make their choice-of-law determinations on an issue-by-issue basis, a doctrine known as *dépeçage*. *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 548 (Minn. Ct. App. 1990); *see also Ewing v. St. Louis-Clayton Orthopedic Grp.*, 790 F.2d 682, 686-87 (8th Cir. 1986). *Dépeçage* is especially appropriate here because Minnesota's choice-of-law rules treat substantive rights and remedial law differently.

Under Minnesota's choice-of-law rules, if the law in question involves procedures or remedies, the inquiry is at an end: ***the law of the forum applies***, and the issue is

resolved. *Schwan's Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 596 (8th Cir. 2007); *Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn. 1983); *see also In re Levaquin Prods. Liab. Litig.*, 2010 WL 7852346, at *6 (D. Minn. Nov. 9, 2010). Where a true conflict of substantive laws exists, Minnesota courts must resolve the conflict in accordance with the "choice-influencing considerations" methodology adopted in *Milkovich v. Saari*, 203 N.W.2d 408, 412-16 (Minn. 1973).

Substantive law "creates, defines, and regulates rights," *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004), and "directly impacts on the accrual of a cause of action in the first instance." *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736 (8th Cir. 1995). Procedural law, "prescribes [the] method of enforcing the rights," while the law of remedies refers to "obtaining redress for their invasion." *Zaretsky*, 464 N.W.2d at 548. The duty elements of negligence liability under New York tort law constitute a substantive area of law, whereas Minnesota's medical monitoring elements expressly relate to the remedy.

a. Minnesota's Choice of Law Rules Require Application of Minnesota's Medical Monitoring Law.

The forum's law determines whether a question is one of substance or procedures or remedies. *See Gate City Fed. Sav. & Loan Ass'n v. O'Connor*, 410 N.W.2d 448, 450 (Minn. Ct. App. 1987). Because Minnesota law treats medical monitoring as a remedy, Minnesota medical monitoring law applies.

In *Werlein v. United States*, the court explained: "Assuming that a given plaintiff can prove that he has present injuries that increases [*sic*] his risk of future harm,

medically appropriate monitoring is simply a future medical cost, which is certainly recoverable." 746 F. Supp. 887, 904-05 (D. Minn. 1990); *see also Palmer v. 3M Co.*, 2005 WL 5891911 (D. Minn. Apr. 26, 2005); *Bryson v. Pillsbury Co.*, 573 N.W.2d 718, 721 (Minn. Ct. App. 1998). In *In re St. Jude Med., Inc.*, Judge Tunheim recognized that a putative class could obtain medical monitoring as a form of ***equitable relief*** under Minnesota law where it sought a unified monitoring program (1) administered by the Court and paid for by a defendant-funded trust and (2) containing provisions for research, epidemiological studies involving the class as a cohort, and information sharing. 2003 WL 1589527, at *43 (D. Minn. Mar. 27, 2003). As discussed *infra*, §III.E, Plaintiffs seek to certify a Rule 23(b)(2) class because they seek a unified monitoring program, court-administered and NHL-funded, to test for symptoms of early-onset NDDCs, that also contains provisions for research, an epidemiological study of Retired Players, and information sharing.

Qualifying for medical monitoring relief is a "matter[] of … remedies … governed by the law of the forum state," Minnesota. *See generally In re Levaquin*, 2010 WL 7852346, at *7 (applying forum state's punitive damages law despite conflict). Because Minnesota's medical monitoring law applies to all Class members, common questions of law will resolve all retired players' right to medical monitoring.

b. Minnesota's Choice of Law Rules Favor Applying New York Law to the NHL's Duties in Tort.

Because Minnesota treats medical monitoring as a remedy for negligence, Christian and Larson would have to demonstrate Class members' entitlement to that

remedy by first establishing that the NHL had, and breached, a duty of care. The existence of a duty of care, sufficient to establish ***liability*** for negligence and negligent misrepresentation by omission, directly affects the accrual of the Class' claim that the NHL was negligent. *Zaretsky*, 464 N.W.2d at 550; *Nesladek*, 46 F.3d at 736. Even if there were numerous, outcome-determinative conflicts (there are not), Minnesota's choice-of-law rules indicate that the Court should apply New York's negligence duties to govern the NHL's conduct relevant to all Class members' claims.

Minnesota long ago moved away from the doctrine of *lex loci delecti* (applying the law where the injury occurs), and instead asks which state has a "priority of interest in the application of its rule of law." *Balts v. Balts*, 142 N.W.2d 66, 70 (Minn. 1966). In *Milkovich*, the Minnesota Supreme Court adopted several "choice-influencing considerations" to resolve true conflicts of substantive law. 203 N.W.2d at 412-16. These considerations include: 1) predictability of results, 2) maintenance of interstate and international order, 3) simplification of the judicial task, and 4) advancement of Minnesota's governmental interest. *Id.* at 412. These factors compel application of New York law.

(1) Predictability of Results

This element addresses "whether the choice of law was predictable before the … event giving rise to the cause of action." *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 7 (Minn. Ct. App. 2003). Where the location of injury is unpredictable, parties have no expectation that a particular state's law will apply. *See, e.g., Boatwright v. Budak*, 625 N.W.2d 483, 489 (Minn. Ct. App. 2001); *Danielson*, 670 N.W.2d at 6.

Class members experienced numerous head impacts in dozens of fortuitous NHL locations all over the U.S. and Canada. If anything, both Class members and the NHL could have predicted that New York law regarding the duty to warn would govern claims based on the NHL's headquarters in New York, where it decided to foster a violent environment and not warn about the increased risks associated with head impacts. *See Mooney*, 244 F.R.D. at 536 (where conduct triggering liability emanated from [defendant's domicile state], "the predictability of results factor favors application of [that state's] law."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145 (2d 1988) (cmt. to subsection (2)) ("When the injury occurred in two or more states, or when the place of injury cannot be ascertained or is fortuitous …, the place where the defendant's conduct occurred will usually be given particular weight in determining the state of the applicable law.").

(2) Maintenance of Interstate and International Order

This element "primarily concern[s] whether the application of [one state's] law would manifest disrespect for [another state's] sovereignty or impede the interstate movement of people and goods." *Jepson v. Gen. Cas. Co.*, 513 N.W.2d 467, 471 (Minn. 1994). It seeks to ensure that New York has sufficient contacts with and interest in the facts and issues being litigated. *Danielson*, 670 N.W.2d at 8; *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 620 (8th Cir. 2001). As discussed, New York clearly has sufficient contacts with this litigation and this factor favors application of New York substantive law.

(3) Simplification of the Judicial Task

This factor concerns the Court's ability to discern and apply the law of a state other than the forum's. *Lommen v. City of E. Grand Forks*, 522 N.W.2d 148, 152 (Minn. Ct. App. 1994). This factor is rarely important because federal courts are well-suited to apply the law of several states. *Miller v. Pilgrim's Pride Corp*, 366 F.3d 672, 674 (8th Cir. 2004). Accordingly, this factor is considered neutral.

(4) Advancement of the Forum State's Governmental Interest

The governmental interest factor requires determining which law most effectively advances a "significant interest of the forum." *Jepson*, 513 N.W.2d at 472. This requirement assures that "Minnesota courts are not called upon to apply rules of law inconsistent with Minnesota's concept of fairness and equity." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 455 (Minn. Ct. App. 2001).

In New York, a negligence duty is considered a "conduct-regulating law[]." *GlobalNet Financial.Com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2d Cir. 2006). When the "failure to act in notifying" the plaintiff forms the basis of the defendant's tort duty, the tort is considered to have occurred where the defendant failed to act, *i.e.*, its principal place of business. *Id.* at 385. In such a case, New York "has the greatest interest in regulating behavior within its borders." *Id.* at 384; *see also HSA Residential Mortg. Servs. v. Casuccio*, 350 F. Supp. 2d 352, 365-66 (E.D.N.Y. 2003).

New York's deep interests in this regard do not offend Minnesota's concept of fairness. Minnesota itself recognizes the policy interest a state has in deterring its own businesses' tortious conduct. *See Fluck v. Jacobson Machine Works, Inc.*, 1999 WL

153789, at *3 (Minn. Ct. App. Mar. 23, 1999); *Mooney*, 244 F.R.D. at 537. New York has a powerful and compelling interest in fostering an economic climate within its borders free from the destabilizing effects of creating a dangerous environment, combined with the failure to warn of escalated risks, and in protecting the State's reputation for ensuring proper business stewardship. Applying New York law to the NHL's negligence and negligent misrepresentation by omission duties would advance Minnesota's governmental interests, which recognize the value of a state's ability to regulate the businesses whose legally relevant conduct emanated from that state.

Minnesota's choice-influencing factors show New York's tort duties should apply to all Class members' claims. Because the legal standards are uniform as to all Class members, the Class is cohesive, and common questions of law and fact will drive the resolution of all class members' claims, Rule 23(a) is satisfied.

3. Alternatively, the Court May Certify a Class Including States with Laws Similar to Minnesota.

If the Court were to find that Minnesota's medical monitoring rules or that New York's tort duties could not apply to all Retired Players, common issues of law would still drive the resolution of all claims because the vast majority of states' laws do not materially differ from Minnesota's. Under Minnesota's choice-of-law rules, if there are no relevant, outcome-determinative differences between laws, there is no conflict; the analysis ends, and the forum's law applies. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 29 (Minn. 1996); *see also Phillips*, 472 U.S. at 816. If differences in state

laws are non-material, a multi-state class involving those states is appropriate. *In re Paxil Litig.*, 212 F.R.D. 539, 545 (C.D. Cal. 2003).

For a player to receive medical monitoring in Minnesota, he will need to show the following elements: (1) exposure to conditions resulting from the defendant's tortious conduct, (2) causing a present injury, such as a cellular, subcellular, or subclinical level, (3) that has increased the plaintiff's risk of future injury. *Werlein*, 746 F. Supp. at 904 (exposure to toxic chemical); *Bryson*, 573 N.W.2d at 720-21 (exposure to toxic pesticide). Plaintiffs have identified the following substantive issues potentially relevant to the facts of this case:

(1) Does state law recognize medical monitoring or provision for future medical examination?

(2) Does a retired player satisfy an element of (a) medical monitoring where he establishes an exposure to a hazardous condition created by defendant that increases the risk or probability of developing a future or enhanced disease state, or (b) liability for future medical exams where he establishes that they will be reasonably necessary?

(3) Does a retired player satisfy an element of medical monitoring or future medical exams where he demonstrates the existence of a present, cellular, subcellular, or subclinical injury?[207]

[207] *See* Ex. 141 (Chart A). Defendant may argue that there is a difference in state law on the issue of whether a plaintiff must demonstrate present injury on the one hand, as opposed to exposure plus an increased risk on the other hand. In this particular case, however, this distinction is not outcome-determinative. Plaintiffs' experts will demonstrate that the level of "exposure" to head impacts that results in an increased risk necessarily depends on the fact that there has been cellular damage. One does not exist without the other in Retired Players. Common evidence supports the fact that every Retired Player experienced biomechanical forces during NHL play sufficient to cause permanent damage to white matter cells. Common evidence also links this cell damage to the increased risk of future injury. Because increased risk cannot be established without traveling through the gate of cellular injury, the fact that some states may not require a showing of present injury is irrelevant in this case.

The following 36 jurisdictions' laws do not have outcome-determinative conflicts with Minnesota with respect to the application of common facts relevant to this case:

> Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, and Washington.

Cf. Exs. 141, 142.

In comparing these jurisdictions' laws, most affirmatively recognize medical monitoring, while others have not. Plaintiffs have included some states as having no outcome-determinative conflicts anyway. The reason is that Plaintiffs' common proof demonstrates that all Retired Players ***have*** a present injury in the form of white matter damage, and that such cellular injury necessitates incurring the medical expense of surveillance. So if a state requires a present injury and permits recovery for future medical expenses related to that injury (*e.g.*, Alaska, *cf. id.* at Ex. 142 (Chart B)), Plaintiffs properly categorized this as having no outcome-determinative conflict with Minnesota, because players would succeed and recover equally under either standard. *See Richie*, 544 N.W.2d at 29 (holding conflict analysis is only triggered where outcome would be different). There is ample authority that medical monitoring and common law liability for future medical costs are indistinct legal principles. *See Werlein*, 746 F. Supp. at 904-05 (holding that medical monitoring relief is "simply a future medical cost, which is certainly recoverable" as traditional tort relief, citing cases). Plaintiffs have identified only 12 states as having outcome-determinative conflicts: Alabama, Arkansas, Georgia,

Idaho, Iowa, Louisiana, Maine, Michigan, New Hampshire, New Mexico, North Carolina, and South Dakota.

Furthermore, Minnesota negligence law also fosters harmony among jurisdictions. A defendant owes a duty of reasonable care where it: (1) knows of danger or the danger is reasonably foreseeable, and fails to warn "foreseeable plaintiffs of impending danger," *Domagala v. Rolland*, 805 N.W.2d 14, 28 (Minn. 2011); or (2) voluntarily assumes a duty, *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 584 (Minn. 2012). Plaintiffs have identified no jurisdictions that present outcome-determinative differences from Minnesota on the following issues, as applied to the facts here: (1) Whether one who voluntarily undertakes to protect a plaintiff has a duty to exercise reasonable care in performing that undertaking where the failure to exercise reasonable care increases the risk of harm; and (2) Where the defendant owes a duty of care to a plaintiff, whether the failure to warn of dangers about which one knows or should know constitutes a breach of a general negligence duty.[208] Finally, all jurisdictions recognize that one owes a duty of care to another when one creates a foreseeable risk of injury to a foreseeable plaintiff, except Arizona and Washington. *Id.*

Due to the numerous, outcome-determinative differences in states' recognition of and legal standards for the negligent misrepresentation by omission theory, Plaintiffs advance that theory as a common issue of law only in the context of its argument that

[208] *See* Ex. 142.

New York negligence standards alone should apply, sections III.D.2.b, *supra*, and III.E-G, *infra*.

E. Class 1 Satisfies Rule 23(b)(2).

Plaintiffs' request for medical monitoring satisfies Rule 23(b)(2), which provides for class treatment where defendant has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." "[I]f the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2)." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360.

While Rule 23(b)(2) contains no predominance or superiority requirements, the Eighth Circuit has held that "class claims thereunder still must be cohesive." *St. Jude*, 425 F.3d at 1121. However, the "key consideration" a "court must assess [is] whether the class members are subject to the very practice or policy of the defendant that is being challenged in the law suit." *Leiting-Hall v. Winterer*, 2015 WL 1470459, at *8 (D. Neb. Mar. 31, 2015); *see also Coley v. Clinton*, 635 F.2d 1364, 1378-79 (8th Cir. 1980) (finding district court erred in denying certification under 23(b)(2) where inmate class members presented common questions of discriminatory commitment procedures and conditions); *Leiting-Hall*, 2015 WL 1470459, at *8; *Smith v. United Healthcare Servs.*,

2002 WL 192565, at *5 (D. Minn. Feb. 5, 2002); *Planned Parenthood Ark. & E. Okla. v. Selig*, 313 F.R.D. 81, 91 (E.D. Ark. 2016). Here, Plaintiffs' claims stem from the NHL's uniform failure to warn the Classes about the long-term health risks and consequences of repetitive head impacts. The NHL's failure to act, on grounds applicable to the entirety of Class 1, compels Rule 23(b)(2) certification.

Also essential to the (b)(2) question is that "the relief sought by the named plaintiffs should benefit the entire class." *Id*. Plaintiffs seek injunctive medical monitoring relief for all Retired Players – the quintessential type of relief that triggers (b)(2) application. *See DeBoer*, 64 F.3d at 1175 (finding Rule 23(b)(2) certification appropriate where "the class sought such injunctive relief"); *In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, 2004 WL 45504, at *4 (D. Minn. Jan. 5, 2004) ("Rule 23(b)(2) [is] appropriate because plaintiffs are requesting medical monitoring via a court-supervised medical monitoring program, which is appropriate injunctive relief as contemplated by Rule 23(b)(2)."), *rev'd on other grounds*, 425 F.3d 1116 (8th 2005).

Federal courts throughout the country have granted Rule 23(b)(2) certification for medical monitoring involving concussion and other exposure-related cases. *See, e.g., In re NCAA Student-Athlete Concussion Injury Litig.*, 2016 WL 3854603, at *7 (N.D. Ill. July 15, 2016); *Donovan v. Philip Morris USA, Inc.*, 268 F.R.D. 1, 22 (D. Mass. 2010); *German v. Fed. Home Loan Mortg. Corp.*, 885 F. Supp. 537, 559-60 (S.D.N.Y. 1995); *Elliott v. Chi. Hous. Auth.*, 2000 WL 263730, at *15 (N.D. Ill. Feb. 28, 2000); *In re Diet Drugs Prods.*, 1999 WL 673066, at *18; *In re NLO*, 5 F.3d 154, 159 (6th Cir. 1993); *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 337-39 (C.D. Cal. 1998); *see also*

MANUAL FOR COMPLEX LITIG. (FOURTH) at 427 (4th ed. 2004) ("Rule 23(b)(2) generally applies" to a mass tort class for medical monitoring "when the relief sought is a court-supervised program for periodic medical examination and research to detect diseases attributable to the product in question.").[209]

Plaintiffs' claims are also sufficiently "cohesive" to warrant medical monitoring under Rule 23(b)(2). None of the Class members are currently receiving or entitled to medical monitoring apart from what this case may produce. Plaintiffs can establish through common evidence that every player experienced white matter cell damage during NHL play and as a result have an increased risk of developing an NDDC requiring monitoring ***beyond*** what the general public needs. This uniform and universal need for medical monitoring clearly distinguishes both *St. Jude* and *Ebert*, where the Eighth Circuit found certification under Rule 23(b)(2) inappropriate for lack of cohesiveness. *See St. Jude*, 425 F.3d at 1122 (finding each heart valve implant patient "***already*** requires future medical monitoring as an ***ordinary part of his or her follow-up care.*** A patient who has been implanted with the Silzone valve ***may or may not require additional*** monitoring"); *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 481 (8th Cir. 2016) (finding that "[r]emediation efforts on each of the affected properties, should they be awarded, will be ***unique***.").

[209] Plaintiffs are in a diametrically different position than those in *St. Jude*, 425 F.3d at 1122, where "plaintiffs ***never*** demonstrated … they would sue for the medical monitoring program ... in the absence of a claim for damages." None seek damages for undiagnosed conditions.

Plaintiffs' negligence and negligent misrepresentation by omission claims seeking medical-monitoring relief warrant Rule 23(b)(2) certification.

1. Plaintiffs' Proposed Medical Monitoring Program Is Sound.

Plaintiffs have demonstrated the exposure to dangerous conditions by the NHL caused a present injury uniform among the Class members,[210] accompanied by an increased risk of future harm.[211] *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046-47 (2016) (because representative evidence that showed average time workers spent donning and doffing protective gear could establish liability as to any particular worker in the class definition, class certification was proper even under stricter (b)(3) predominance standard). Because of the NHL's negligence, Plaintiffs and the Class require medical monitoring. Dr. Cantu has concluded that medical monitoring is appropriate to determine whether players are suffering from post-concussion syndrome (or other alternative diagnoses), or an NDDC resulting in cognitive impairment or behavioral or mood disturbances.[212] This medical monitoring program would involve (a) a comprehensive history and neurological examination (to be done by a board certified neurologist, neurosurgeon, or physician trained in concussion management); (b) blood tests of

[210] *Supra* §II.F.1.

[211] *Supra* §II.F.2.

[212] Cantu Declaration, §VI.B.

pituitary function; (c) a neuropsychological examination; and (d) an MRI, allowing differential diagnosis of the Class members.[213]

Dr. Comstock has concluded that "there is a crucial need to learn as much as possible about the short and long term health concerns affecting retired NHL players" for the benefits of NHL retirees, and even present and future NHL players.[214] This would be accomplished by a retrospective and prospective study that Plaintiffs seek on behalf of the Class. The retrospective study would involve a review of de-identified medical records, a detailed survey to all Retired Players, their concussion history, and self-identified symptoms, and finally a comparison and analysis of the two data sets.[215] This would allow comparatively quick gathering of data for study, and serves as an effective starting point for researching the Class' neurological health.

Finally, a prospective study would be conducted, involving annual surveys to Retired Players to assess their self-reported health status, and an annual sampling of study participants to undergo clinical assessments of their health.[216] These results would then be compared with the Retired Players' medical records, allowing detailed analysis of the potential effects of the numerous head hits sustained by the Class members.[217]

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[213] *Id.*

[214] Comstock Declaration, §VI.

[215] *Id.* §VI.1.

[216] *Id.* §VI.2.

[217] *Id.*

2. Common Evidence Can Establish the NHL Owed a Duty of Care.

Because medical monitoring is a remedy for negligence liability, one of the common issues for resolution a class trial is whether the NHL owed a duty of care to its players. Because New York law should be applied to the class as a whole, and common evidence supports collective resolution of these issues, (b)(2) certification is appropriate.

3. The NHL's Conduct Created a Foreseeable Risk of Harm to Players.

Under New York Law,[218] courts look to "whether the plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks." *Powers ex rel. Powers v. 31 E 31 LLC*, 20 N.E.3d 990, 996 (N.Y. 2014). In other words, "the risk reasonably to be perceived defines the duty to be obeyed." *Sanchez v. State*, 784 N.E.2d 675, 678 (N.Y. 2002). In the sports-concussion context, other courts have concluded that while there is no duty to warn about obvious risks that are inherent in the game, the compounding impact of multiple concussive hits are not an obvious risk, and therefore a duty to warn exists. Ex. 150.

This issue is especially well-suited to class treatment because it is objective and focuses on the NHL's uniform actions and (inaction). First, Plaintiffs' common evidence will show that repetitive head trauma is not only a common occurrence in the NHL, but medically and scientifically leads to long-term neurological issues, as the NHL with its teams of doctors and medical staff, knew or should have known. This evidence includes

[218] To the extent New York law does not apply universally, the elements of duty and breach can be applied cohesively to the entire class as described in §III.D.

internal NHL documents,[219] testimony from a journalist and author who has researched and written extensively about the history of professional ice hockey and the NHL, and expert testimony from an epidemiologist, a neurosurgeon, a biomechanist, and a medical historian.

Second, Plaintiffs' evidence will show the NHL's conduct created and fostered a culture that created a foreseeable risk of neurological damage to the Class. Reams of internal NHL documents bear out the League's promoted culture of "toughing it out" and "playing through pain," including: 1) fighting; 2) "headhunting" and other unnecessary violence; 3) failure to properly care for players with concussion; 4) and failure to implement a meaningful concussion protocol. *See supra* §II.

4. The NHL Voluntarily Assumed a Duty of Care to Protect Its Players.

The NHL's voluntary confirmations of its existing duty of care is also a central issue, provable on a classwide basis, the resolution of which will materially advance the efficient disposition of this case. Common evidence will establish the NHL, as steward of the league, voluntarily confirming its duty to protect its players. *See supra* §II. New York law recognizes that, "one who assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully." *Kievman v. Philip*, 84 A.D.3d 1031, 1032 (N.Y. App. Div. 2011). This duty is rooted in the NHL's broad authority to govern all aspects of league play. *See supra* §II.A. The duty is also founded upon the NHL's vastly superior managerial, medical, legal and other resources to gather, analyze,

[219] *See generally* §II.A-E.

and understand concussion and head injury data, and its numerous admissions that it has always acted as a caretaker of player health and safety. *See supra* §II.D.

The NHL's confirmation of its duty of care to the players can be seen in the NHL's comprehensive undertaking to survey injuries, including concussions, by collecting and analyzing information on every on-ice injury for at least the past two decades. *See supra* §II.E.2. This endeavor demonstrates the NHL's vastly superior ability to gather, analyze, and understand the correlation between, for example, the speed of playing surfaces, board and glass configurations, playing rules and enforcement of rules, distances between lines, distances between goal lines and end boards, size and player position, on the one hand, and, on the other hand, the frequency, severity and duration of concussions and other head injuries. *Id*. The NHL has created a program and working group specifically to collect and analyze data on concussions sustained by NHL players. *Id*.

This type of evidence establishing the NHL's duty of care to its players is entirely common to the class. The NHL has acknowledged and maintained this duty throughout its existence. Resolution of this threshold issue, on a class-wide basis, will significantly advance the litigation.

5. The NHL Breached Its Duties by Failing to Warn.

Just as the NHL's duty of care can be demonstrated through common evidence, so too can the NHL's breach of that duty. "Under general tort rules, a person may be negligent because he or she fails to warn another of known dangers or, in some cases, of

those dangers [of] which he [or she] had reason to know." *Chambers v. Evans*, 104 A.D.3d 1301, 1301 (N.Y. App. Div. 2013).

Here, Plaintiffs allege the ***absence*** of a warning – essentially an omission. To the extent the NHL alleges it gave a warning, then the question becomes whether "a reasonably prudent person" would consider the warning to be an appropriate exercise of care. *See Billiar v. Minn. Min. & Mfg. Co.*, 623 F.2d 240, 245 (2d Cir. 1980) ("The duty is not merely to warn, but to warn adequately [under New York law].") That objective question can be answered collectively on behalf of the class.

Because common questions of Minnesota and New York law will drive the litigation, common evidence can provide answers to those common questions, and the law and the facts establish Retired Players' basis to collectively seek injunctive (medical monitoring) relief, the Court should certify a Rule (b)(2) class and appoint Christian and Larson as its representatives.

F. Alternatively, Because Relevant States' Legal Standards Are So Similar, the Court Should Certify Class 1 Using the Grouping Procedure.

If the Court denies Christian and Larson's motion pursuant to their choice-of-law procedure, Plaintiffs Christian, Larson, Nicholls, and LaCouture move, in the alternative, to certify a medical monitoring class based on the well-recognized grouping procedure. In place of applying only Minnesota and New York law, the requirements of Rule 23 can still be met by grouping similar states together into manageable categories. *See In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 607 n.14 (D. Minn. 1999) (Kyle, J.) (holding that even if Minnesota law did not ultimately apply to all, class action may be

maintainable because "the tort regimes of the various states can appropriately be grouped into a relative few general categories"); *cf. Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 302 (3d Cir. 2011); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 315 (3d Cir. 1998). If the Court were to decide that the state law of a player's current residence should apply, for instance, those class members' claims could be tried together in groups who share similar legal standards.

As shown above, Plaintiffs have catalogued the relevant elements of medical monitoring law and negligence duties in all states.[220] Based on this survey, the states can be corralled into a handful of manageable groups. Plaintiffs respectfully request that Christian, Larson, Nicholls, and LaCouture be appointed as class representatives if the Court grants (b)(2) certification based on their proposed grouping procedure.

G. Certification of Issues of Liability Under Rule 23(c)(4) Is Appropriate for Class 2.

Finally, Plaintiffs Leeman and Zeidel move for issue certification of Class 2 pursuant to Rule 23(c)(4), which states: "[W]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Established authority teaches:

> The underlying philosophy of Rule 23(c)(4)(A) ... is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member. Accordingly, even if only one common issue can be identified as appropriate for class action treatment, that is enough to justify the

[220] *See* Exs. 141, 142.

> application of the provision as long as the other Rule 23 requirements have been met.

7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE §1790 at 187.

Consistent with the Advisory Committee notes to Rule 23(c)(4),[221] numerous Circuit Courts have blessed Rule 23(c)(4) issue certification to resolve common issues efficiently, even where other issues in the case may require individualized proof. *See, e.g.*, *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."); *Butler*, 727 F.3d at 800 ("[A] class action limited to determining liability … with separate hearings to determine – if liability is established – the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed."); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860-61 (6th Cir. 2013).

Some conflict exists concerning what is an appropriate case for issue class certification. *See, e.g.*, 2 RUBENSTEIN §4:91, at 381-82 ("courts and commentators are

[221] "This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." Fed. R. Civ. P. 23(c)(4) advisory committee's note to 1966 amendment.

sharply split on when issue certification is proper under Rule 23(c)(4)"); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008). The *St. Jude* court observed that those courts that "approved 'issue certification' have declined to certify such classes where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation." *Id.* at 841.[222] But as the Ninth, Seventh, Second and Sixth Circuit rulings teach, issue certification is entirely proper where, as here, it will generate answers to common questions at the core of the case, driving the efficiency of overall resolution.

After *St. Jude*, this Court in *Cruz v. TMI Hosp., Inc*., certified a liability-only class under Rule 23(c)(4) to bifurcate common issues of liability from individualized issues of damages, following the approach of a majority of Circuits that predominance is required only with respect to a specific issue and not the entire cause of action. 2015 WL 6671334, at *9 (D. Minn. Oct. 30, 2015) (Nelson, J.). As this Court explained, "liability – not damages – is the focus of the commonality and predominance inquiries." *Id.*

More recently, Judge Magnuson in *Target* commented on the important function of Rule 23(c)(4):

> [T]he need for individualized damages decisions does not ordinarily defeat predominance where there are ... disputed common issues as to liability. Having found such common liability issues, the question whether damages issues also predominate is thus less significant. Damages can and often are left to determination after liability issues are resolved, and indeed the Rules provide for certification of issue classes, allowing courts to certify a liability class but leave damages questions for later resolution.

[222] The Eighth Circuit's reversal of certification under Rule 23(c)(4) in *St. Jude* did not hold that issue certification was never appropriate.

309 F.R.D. at 488.

Classwide resolution of issues common to a similarly situated group while later resolving issues of, for example, causation and damages in individual trials is precisely the approach the Florida Supreme Court applied in its seminal *Engle* decision. *See Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1276-77 (Fla. 2006). Following reversal of certification of a damages class by the Florida Supreme Court, [223] individual smokers filed and tried their individual negligence and fraud claims against the cigarette manufacturers, only needing to prove causation and damages (and entitlement to punitive damages) in order to prevail. *See Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1283 (11th Cir. 2013); *cf. Butler*, 727 F.3d at 798.

Here, Plaintiffs are seeking Rule 23(c)(4) certification on the issues of the NHL's duty of care and breach of such duty of care for all Class 2 claims. Just as in the tobacco cases, issues of the NHL's duty and breach of that duty are common to the class and certification under Rule 23(c)(4) would increase the efficiency of the litigation for all Class members and Defendant. The answer to those fundamental common factual issues will drive every claimant's case, such as whether head impacts substantially contribute to

[223] In *Engle*, the Florida Supreme Court instead allowed numerous issues common to all tobacco smokers to be applied class-wide; including: (1) smoking cigarettes causes various diseases; (2) nicotine in cigarettes is addictive; (3) cigarette manufacturers placed cigarettes on the market that were defective and unreasonably dangerous; (4) cigarette manufacturers concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both and that all of the cigarette manufacturers were negligent; and (5) all of the cigarette manufacturers were negligent. *Id.*

the development of various signature diseases, and whether Retired Players are at an increased risk for developing them. Allowing ***one jury*** to decide central common legal and factual issues, will provide the most efficient manner to resolve the claims of members of Class 2, who may then individually seek damages for their personal injuries. Rule 23(c)(4) certification is appropriate.

Zeidel filed its properly-venued complaint in Minnesota, resulting in this Court being able to apply Minnesota's choice of law rules with the same results as argued earlier: the application of New York negligence liability standards. Although Leeman filed his original complaint in Washington, D.C., the District's choice-of-law rules would not alter the application of New York law. Negligence liability based on failure to warn, as discussed above, centers the locus of relevant conduct where the defendant failed to act – its principal place of business. District of Columbia courts have applied the law of the state where the defendant has its principal place of business and where the relevant conduct occurred. *See ABB Daimler-Benz Transp. v. AMTRAK*, 14 F. Supp. 2d 75, 89-90 (D.D.C. 1998) (applying New Jersey law to tort claims, based upon defendants' principal place of business); *Beals v. Sicpa Securink Corp.*, 1994 WL 236018, at *3 (D.D.C. May 17, 1994) (applying law of defendant's home state, where defendant omitted to provide adequate warnings). In addition, District choice-of-law rules recognize, as does Minnesota's, that the place of injury is of "relatively minor importance" when the injury "might well have occurred in one of any number of states." *In re Air Crash Disaster at Wash.*, 559 F. Supp. 333, 349 (D.D.C. 1983).

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order: (1) certifying this action as a class action pursuant to Fed. R. Civ. P. 23(b)(2) and 23(c)(4); (2) appointing Christian, Larson, Leeman and Zeidel, or in the alternative, Christian, Larson, LaCouture, Nicholls, Leeman and Zeidel, as Class Representatives; (3) appointing Plaintiffs' Co-Lead Counsel, Zimmerman Reed, LLP, Robbins Geller Rudman & Dowd LLP, and Silverman Thompson Slutkin White LLC, as Co-Class Counsel for the Classes pursuant to Fed. R. Civ. P. 23(g); and (4) granting such other and further relief as the Court deems just and proper.

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